IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.61 OF 2004

Shri Ishwar Ramchandra Zambare .. Appellant

Versus

Shri Bhanudas Shankar Zambare & anr. Respondents

Mr.D.A.Nalawade for appellant

CORAM : P.V.KAKADE,J.

DATE : 14th SEPTEMBER,2004

P.C.:

1. This Second Appeal is preferred by unsuccessful plaintiff in both the Courts below, against the judgment and order passed by Addl. District Judge, Pune in Civil Appeal No.254 of 2002 dismissing his appeal and confirming the judgment and order dismissing his suit by Joint Civil Judge, Junior Division, Pune dated 21.2.2002.

2. I hared the learned counsel for the appellant. Perused the record. It appears therefrom that the appellant filed a suit for possession of the open site bearing No.260 admeasuring 1600 sq. ft. situated at Holkarwadi, Tal. Haveli with mandatory injunction directing the defendants to remove the construction raised on the said open site i.e the suit property and for future mesne profits. The defendant no.2 is Gram Panchayat, Holkarwadi against whom no relief has been sought. The defendant no.1 resisted the suit contending that he has not raised construction over the suit property. Considering the rival contentions of the parties and evidence led by them the learned trial judge by his Judgment dated 21.2.2002 dismissed the suit. The appeal preferred against the said judgment in the District Court, Pune was also dismissed by Addl. district Judge and hence the present appeal.

3. It is the contention of the appellant that he is the owner of the suit property bounded by open site of Uttam Bala Zambare from eastern side, properties of Maruti Kushaba Khote and one Kare from western side, a road from southern side and properties of Raghunath Bala Zambare and Kisan Mahadeo Zambare from northern side.

According to the appellant, the defendant no.1 encroached upon the suit property and raised construction of a bungalow thereon. Its plinth area is 1500 sq.ft the suit property stands in the name of plaintiff in Grampanchayat record and had obtained the construction permission to raise construction over the suit property, but the defendant no.1 caused obstruction when the plaintiff started digging the site in the suit property for laying foundation. Hence the suit came to be field for perpetual injunction against the defendant no.1 and his family members. The respondent-defendant no 1 obtained construction permission from Grampanchayat allegedly posing that he was raising construction over his open site bearing No.257. The defendant no.1 completed that construction and therefore, the plaintiff withdraw that suit and filed the present suit for possession and mandatory injunction directing the defendant no.1 to remove that construction.

4. The Respondent no.1 i.e. defendant no.1 came with the case that the plaintiff is not owner of the suit property within the boundaries specified by him. The defendant no.1 had obtained construction permission from Gram Panchayat and raised construction of a bungalow on

the open plot bearing G.P.No.257 admeasuring 50’ x 35’. According to him he has not raised any construction on the property bearing Gat. No.260 i.e. the suit property. According to the Respondent, the Gat No.260 the suit property is located at long distance from his bungalow plot of Gat No.257 and therefore there is no question of making encroachment over the suit property. Hence the suit was sought to be dismissed on this count alone.

5. As noted earlier both the courts below have adjudicated the proceedings on merits and have come to the conclusion that the plaintiff has no case and as such the suit as well as the appeal came to be dismissed. Hence the present appeal.

6. At the outset it may be noted that the only so called substantial question of law sought to be raised in this appeal is to the effect that both the courts below have wrongly appreciated the evidence on record, which is in the nature of resolution passed by Respondent no.2 Grampanchayat showing that the property of Respondent is in the land of Gat No.260 i.e. the suit property, inspite of this position the courts below

have come to the conclusion that the boundaries of Plot No.260 owned by the appellant were in fact boundaries of Plot No.257 held by respondent no.1 earlier.

. On perusal of the judgment of both the courts below and available record I am satisfied that both the courts have properly appreciated the evidence before them and have come to the conclusion that the Respnodent-defendant no.1 has not encroached upon the suit property owned by the appellant and therefore, there was no question of decreeing the suit for possession as well as mandatory injunction.

7. The Apex court in the case of **KONDIBA DAGADU KADAM VS. SAVITRIBAI SOPAN GUJAR & ORS. AIR 1999 (3) SUPREME COURT 2213**, has observed that the conditions mentioned in the Section 100 must be strictly fulfilled before a second appeal can be maintained and no Court has the power to add to or enlarge those grounds. The second appeal cannot be decided on merely equitable grounds. The concurrent findings of facts howsoever erroneous cannot be disturbed by the High Court in exercise of the powers under section 100 of C.P.C. In a case where from a given set of circumstances two inferences are

possible, one drawn by the lower appellate court is binding on the High Court in second appeal. Adopting any other approach is not permissible. If we take into account this ratio laid down by the Apex Court and take into account the relevant aspects involved in this appeal there is no doubt whatsoever that any substantial question of law is involved in this appeal and as such the appeal stands dismissed. Hence the appeal stands dismissed in limine.